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Supreme Court of the United States

APRIL TERM, 1953.

No. .....

NEW PITTSBURGH COAL COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on the fifth day of January, 1953, in the above entitled cause (R., page 51).

JUDGMENT BELOW.

The decision of the court below is reported in 200 F. (2d), page 146.

JURISDICTION.

This court has jurisdiction to review said decision under Section 240 of the Judicial Code (28 U. S. C. A. No. 347).

This case presents an important question of general law in that it would establish a rule for the Sixth Circuit different from the rule of other circuits, notably the fourth and fifth.

Obviously it would be impracticable if not impossible for taxpayers and accountants in the Sixth Circuit, and for the Bureau of Internal Revenue to apply such a rule in actual practice.

QUESTIONS PRESENTED.

Should the cost of mine rail, purchased by a coal mining company operating only fully developed mines and therefore to be charged to current operations, be so charged at the time of purchase consistent with the taxpayer's practice followed and approved in former years (as is the established rule in the Fourth and Fifth Circuits), or must the taxpayer wait until all of such rail has been used and its "exact use" so determined, as the Court of Appeals' decision would establish the rule for the Sixth Circuit?

STATEMENT.

The Collector of Internal Revenue held that the taxpayer had erroneously charged to expense 22 items that should have been capitalized. (Finding No. 4, R., 12.)

Upon the taxpayer's claim for refund the commissioner reversed himself as to 7 items of copper wire. (Findings Nos. 5 and 7, R., 13.)

In the instant litigation on the remaining 15 items the government took the position in the District Court that (in spite of the allowance as expense of the cost of copper wire, which it would have required to be capitalized if the mines had not been fully developed) the taxpayer must prove that the mines had been developed and equipped to their predesigned and normal output capacity. The District Court found that all the mines had been so developed; and the government has not appealed. (Finding No. 8, R., 13.)

The District Court held that the commissioner had erroneously charged to capital 7 items in addition to the copper wire; and the government has not appealed. (Conclusion of Law No. 5, R., 16.)

But the District Court held (Conclusion of Law No. 6, R., 16) that the appellant had failed to prove that the commissioner had improperly charged to capital the remaining 8 items:

1. 40 pound rail in mines 14, 15 and 16 (3 items). (Findings Nos. 12 and 15.)

2. 80 pound rail for temporary storage of railroad cars at mine No. 16. (Finding No. 13.)

3. Adding machines (2 items), furnace for superintendent's house, and freight elevator in mine store. (Findings Nos. 16, 17, and 18

The plaintiff appealed and the Court of Appeals reversed the District Court as to Item No. 2 and affirmed as to Items 1 and 3. The decision as to Item 3, unsubstantial in amount, presents no question for this court; but the decision as to Item No. 1 presents a question of general interest to all coal mining companies, and the Court of Appeals has denied rehearing.

RULINGS OF THE COURT BELOW.

In the thirty years that this matter has been before the bureau and the courts the original holding of the collector that the taxpayer had erroneously charged to expense 22 items that should have been capitalized has been **reversed** as to all substantial items except 40 pound mine rail.

As to the 40 pound mine rail the **only** finding of fact was, "There is no evidence as to the exact use made of any of the 40 pound rail in question in this lawsuit," and the District Court held that in the absence of evidence as to "the exact use made of any of the 40 pound rail in question" the cost thereof should be charged to capital, and the Court of Appeals affirmed.

REASONS FOR GRANTING THE PETITION.

After a long period of controversy, the Circuit Courts of Appeals for the Fourth and Fifth Circuits, embracing a large part of the coal producing territory of the United States, agreed on the correct rule to be applied. Since a very large percentage of the cases involving the question arose from that territory, the Board of Tax Appeals was practically forced, in the **West Virginia & Pittsburgh Coal Company** case (24 B. T. A., 234), September 30, 1931, to reverse the **Union Collieries** decision and thereafter to apply the **Marsh Fork** rule. We quote from page 241:

"The principal issue in these proceedings is whether the petitioner may deduct from gross income in the tax years involved amounts paid for additional machinery and equipment to maintain the normal output of its mines. The issue is decided in favor of the petitioner, upon the authority of **United States v. Roden Coal Co.**, 39 F. (2d), 425; **Marsh Fork Coal Co. v. Lucas**, 42 F. (2d), 83; **Commissioner of Internal Revenue v. Brier Hill Collieries**, 50 F. (2d), 477, inconsistent with or reversing decisions of the board which held that such expenditures were not deductible from gross income as ordinary and necessary expense. In view of the above cited cases, the decision of the board in **Union Collieries Co.**, 3 B. T. A., 540, will not be followed in the future."

Thereafter, that is since 1931, the government abandoned its attempts, in all **new** cases, to procure acceptance of its erroneous view of the law; but the instant case was already pending and the government has not ceased **in this case** to contend for the erroneous rule.

The well established **Marsh Fork** rule (Fourth and Fifth Circuits) should not be disturbed by a decision in this case in which the government, years ago, took a position that it has long since abandoned.

It is obvious that the cost of all expense items, such as mine rail, must be properly entered on the books of the company **at the time of purchase** or delivery at the mine and not at some future date, which would probably be during a future taxable year, when the rules have all been used and the **"exact"** use therefore established.

A correct rule should be stated by the Supreme Court to guide all mining companies in future years.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT OF APPEALS.

The opinion rendered by the Court of Appeals is reported in 200 Fed. (2d), 146.

JURISDICTION.

The judgment of the Circuit Court, denying petition for rehearing, was entered January 5, 1953. Time within which to file this petition was extended to and including April 25, 1953.

THE FACTS.

The entire finding of the government's valuation engineer as to mine rail was as follows:

> "This mine rail is used generally on the main entries. It is not shown that the rail purchased was used for the purpose of repairing the existing haulage track. It is probable that the permanent track was extended. The main haulage roads serve the entire tonnage and any additions thereto constitute improvements. Where a company has adopted a policy of charging similar costs to expense each year after the stage of operations has been reached it should be continued. In this case it has not been shown that the past practice has been to charge such costs to operations. It appears, therefore, that this cost properly belongs in the capital account."

In the trial court the adopted policy of charging similar cost to expense each year was shown. (R., 20, 36-38.)

The mines had been developed and equipped to produce, and were capable of producing their predesigned and expected maximum tonnage. (Finding No. 8, R., 14.)

The use of 110 additional mine cars was made necessary by the receding working faces and the consequently longer hauls from the working faces to the tipples. (Finding No. 15, R., 15.)

All the mines had forty pound rails in the main entries. (Sup. R., 7) No evidence was offered to show whether any of the rail was used for repairing rather than extending the haulage track, as this is immaterial. The sole finding of the trial court was: "There is no evidence as to the exact use use made of any of the 40 pound rails in question in this lawsuit." (Finding 12, R., 14.)

The history of the instant case appears in the statement in the petition.

SPECIFICATION OF ERROR.

The court held that the cost of mine rail, charged to expense by the taxpayer in accordance with its practice of prior years, should not have been so charged because the "exact use" was not shown. This is in direct conflict with the well established **Marsh Fork** rule (**Marsh Fork Coal Co. v. Lucas**, 42 F. (2d), 83, C. A., 4th). The principles of the **Marsh Fork** rule applicable to the instant case were recently quoted and approved in **Commissioner v. Harmon Coal Corp.**, — Fed. (2d), —, C. A. 4th, Sept. 17, 1952.

ARGUMENT.

The trial court found that at the time of the purchase the mines had been fully developed to their predesigned and expected maximum tonnage (Finding 8, R., 14) and that the use of additional mine cars was made necessary by the receding faces and the consequently longer hauls from the working faces to the tipples. The 40-pound rail was as such a part of the "permanent haulage road" as the cars and the copper wire (R., 26 and Sup. R., 7). The undisputed testimony that 16-pound rail was used in the rooms (Sup. R., 7) negatives the use of the 40-pound rail for any purpose other than to extend or repair the main haulage tracks, but even if it were so used the cost would be deductible if the **Marsh Fork** rule is correct.

The court's decision is in conflict with, and would establish a rule for the Sixth Circuit different from, the rule of other circuits, notably the fourth and fifth.

Marsh Fork Coal Co. v. Lucas, 42 F. (2d), 83, C. A. 4th;
Parkersburg Iron & Steel Co. v. Burnet, 48 F. (2d), 163, C. A. 4th;
Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp., 64 F. (2d), 347, C. A. 4th;
United States v. Roden Coal Co., 39 F. (2d), 425, C. A. 5th;
Commissioner v. Harmon Coal Corp., —— F. 2d), ——, C. A. 4th.

THE MARSH FORK RULE.

The **Marsh Fork** decision is not based upon facts peculiar to that particular case. It discusses in detail **general** accounting methods and announces the rule to be followed in all mines after reaching the stage of producing the predetermined output capacity. Quoting Dicksee, Mines Accounting and Management, the court said (p. 86):

"After the producing stage is reached, no expenditure should be charged to Capital Account except **large special items**, (emphasis added) such as (1) Purchase of additional property; (2) Sinking of new main shafts to reach ore bodies; (3) Erection of additional buildings, machinery, plant, or surface works which may be necessary either to increase output, to improve recovery, or to decrease costs."

And quoting Regulations 45, Art. 222, the court said (p. 87):

"After a mine has been developed and equipped to its normal and regular output capacity, the cost of minor items of equipment and plant, including mules, motors, mine cars, trackage, cables, trolley wire, fans, small tools, etc., necessary to maintain the normal output, and the cost of replacement may be charged to current expenses of operation."

The opinion in the **Marsh Fork** case reveals an exhaustive study of the outstanding authorities on mine accounting and a careful detailed exposition of the rules to be applied. It is respectfully submitted that the Supreme Court of the United States should not place its approval upon the hastily considered **per curiam** opinion of the Sixth Circuit upsetting the well considered, long established rule of the Fourth and Fifth Circuits.

Respectfully submitted,

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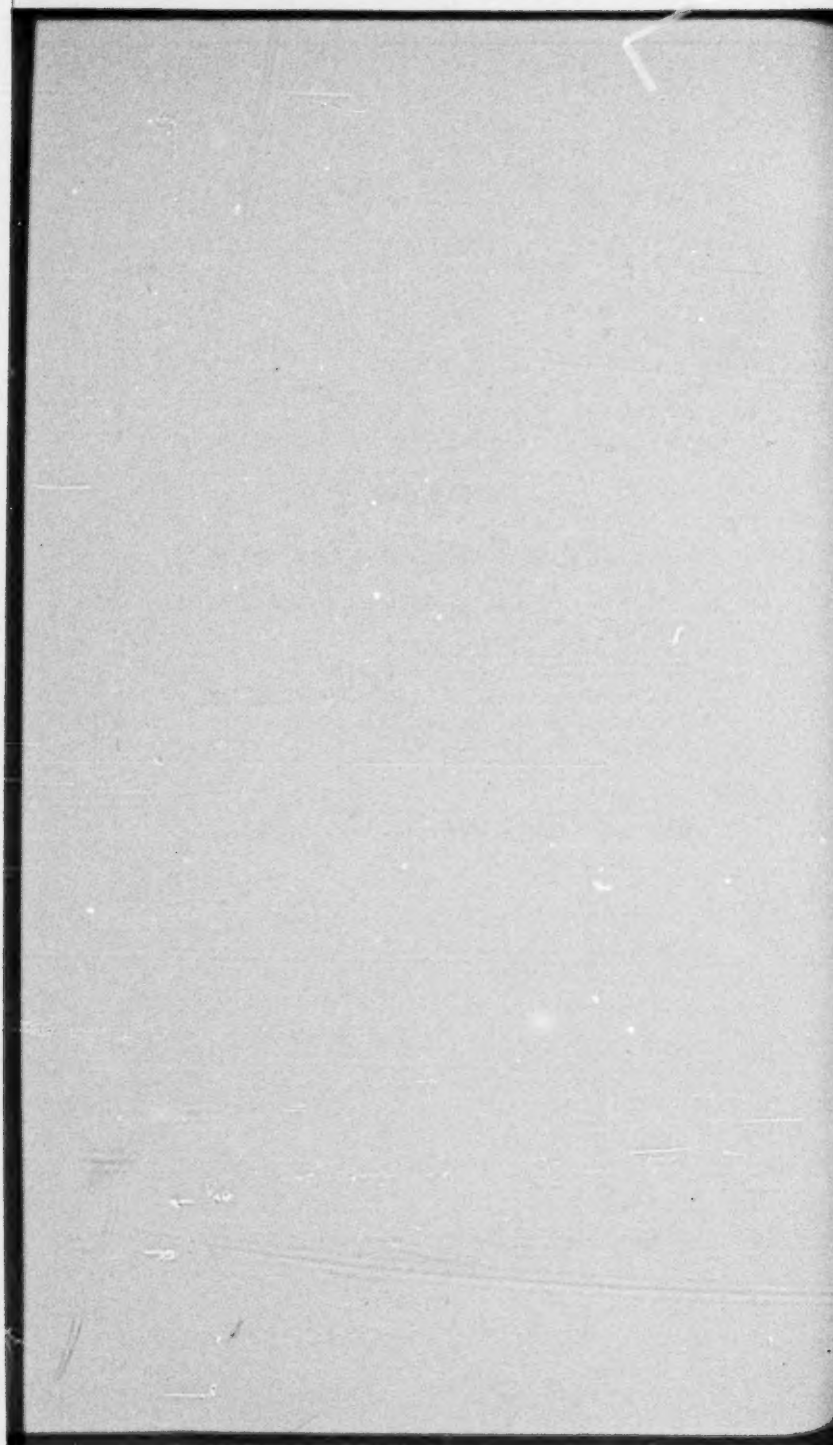

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 45

NEW PITTSBURGH COAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 52-55) is reported at 200 F. 2d 146. The findings of fact and conclusions of law of the District Court (R. 10-16) are reported at 99 F. Supp. 253.

JURISDICTION

The judgment of the Court of Appeals (R. 51) was entered December 1, 1952. A timely petition for rehearing (R. 57-61) was denied by the Court

of Appeals on January 5, 1953 (R. 63). The time within which to file a petition for a writ of certiorari was extended to April 25, 1953, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the taxpayer has established that the cost of certain forty pound rails is deductible as an ordinary and necessary expense under Section 234(a)(1) of the Revenue Act of 1918 in computing taxable net income for 1920.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;
>
> * * * * *

STATEMENT

This proceeding involves a suit brought in the United States District Court for the Southern District of Ohio by New Pittsburgh Coal Company, an Ohio corporation (herein referred to as the taxpayer), for refund of $11,654.76 paid as federal income tax for the taxable year 1920, all of which depended upon the taxpayer's claim for deduction of various amounts as ordinary and necessary business expenses for that year.[1] (R. 1-6.) From a judgment awarding it a refund of $8,277.64 (R. 17) the taxpayer prosecuted an appeal to the Court of Appeals for the Sixth Circuit, alleging error on the part of the District Court with respect to the disallowance of three items claimed as ordinary and necessary business expenses. The Court of Appeals reversed the District Court as to one item claimed as a deduction and affirmed as to the other two items (R. 52-55), one of which is now abandoned (Pet. 4).

The one item still in controversy is an expenditure, in aggregate, of $4,866.83 in 1920 for forty pound mine rails. (R. 12, 16, 17.) The District Court found generally that at the time the expenditures originally involved were made the taxpayer's mines had been fully developed and equipped to their predesigned and normal output capacity (R. 13-14), and made specific findings with respect to the several items of expenditure claimed as deductions (R. 14-15). With respect to

[1] Incredibly, the dispute has already continued for more than thirty-two years.

the forty pound rails here involved the District Court found (R. 14): "There is no evidence as to the exact use made of any of the 40 pound rails in question in this lawsuit." It concluded as a matter of law, with respect to this item and the other items involved in the appeal below, that "Plaintiff has failed to prove that the commissioner improperly charged the following items and amounts to capital." (R. 16.)

ARGUMENT

The record in this case presents no basis for granting a writ of certiorari. Whether an expenditure is deductible from gross income as an ordinary and necessary business expense within the meaning of the statute depends upon the facts of the particular case (*Welch* v. *Helvering,* 290 U.S. 111), and in a suit for refund of income taxes the burden is upon the taxpayer to prove he has overpaid his tax. (*Lewis* v. *Reynolds,* 284 U.S. 281).

The decision of the District Court in the instant case, so far as the question here involved is concerned, was based entirely upon the taxpayer's failure to prove the use made of the forty pound rails (R. 14, 16), and its decision was affirmed by the Court of Appeals solely on that ground. It said (R. 54):

> We can not assume, without proof of some sort, as contended by the taxpayer, that since coal was being mined and the face of the mine receding, these rails were used in order to maintain normal output.

Since the decision in the instant case was based solely on a failure of proof, there is no merit to the contention (Pet. 8) that the decision is in conflict with, or would establish a different rule from that prevailing as a result of, the decisions in *Marsh Fork Coal Co.* v. *Lucas,* 42 F. 2d 83 (C.A. 4th); *Parkersburg Iron & Steel Co.* v. *Burnet,* 48 F. 2d 163 (C.A. 4th); *Fidelity-Phenix Fire Ins. Co.* v. *Benedict Coal Corp.,*64 F. 2d 347 (C.A. 4th) (which did not involve federal taxes); *United States* v. *Roden Coal Co.,* 39 F. 2d 425 (C.A. 5th); and *Commissioner* v. *H.E. Harman Coal Corp.,* 200 F. 2d 415 (C.A. 4th). On the contrary, the court below clearly recognized and applied the rule of the above cases to the extent permitted by the facts, and also held that it had been properly applied by the District Court in this case. Furthermore, the decision of the Court of Appeals for the Fourth Circuit in *Commissioner* v. *H. E. Harman Coal Corp., supra,* clearly demonstrates the factual nature of these cases.

This is plainly an isolated case involving only a small amount of tax and does not present any issue of general importance.

CONCLUSION

The decision below is right. It is fully supported by the facts and the law and is not in conflict with any other decision. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1953.

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No. 45.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

NEW PITTSBURGH COAL COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF.

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IN THE

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OCTOBER TERM, 1953.

No. 45.

NEW PITTSBURGH COAL COMPANY,
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Respondent.

REPLY BRIEF.

The brief in opposition is grossly unfair in that it assumes that the record shows a failure of proof of facts necessary to bring the case within the March Fork rule of the Fourth and Fifth Circuits.

By the briefer's own admission (Br., 4), the decision below rests "solely" on the alleged failure to prove one fact, to wit "the use made of the forty pound rails." This

admission must stand corrected (R., 14), to read "exact use." Such a decision, if allowed to stand, would be in conflict with the long established Marsh Fork rule of the Fourth and Fifth Circuits. (Pet., 9.)

In all fairness the District Court's finding of facts as to the "**exact** use made of **any** of the 40 pound rail" must be read in the light of the government's original determination disallowing the expense.

> "This mine rail is used generally on the main entries. It is not shown that the rail purchased was used for the purpose of repairing the existing haulage track. It is probable that the permanent track was extended. The main haulage roads serve the entire tonnage and any additions thereto constitute improvements. Where a company has adopted a policy of charging similar costs to expense each year after the stage of operations has been reached it should be continued. In this case it has not been shown that the past practice has been to charge such costs to operations. It appears, therefore, that this cost properly belongs in the capital account." (Pet., 6.)

The testimony in the District Court clearly established that 40 pound rail was in fact (as assumed by the government) used in the main entries. (Pet. 8, wherein "such" in the seventh line should read "much".) In short, the inexactness is that the taxpayer made no effort to prove that any of the rails were used for repairs rather than extension of the permanent track. But this is immaterial as demonstrated by the government's own further statement (Pet., 6) that "where a company has adopted a policy of charging similar cost to expense * * * **it should be** continued." (Such adopted policy was proven without dispute in the District Court.) The government was correctly stating the long established rule of the Marsh Fork case, recently approved in the Harmon case. The decision below, if

allowed to stand, would be in conflict and would create serious accounting problems for mining companies.

Throwing logic to the winds, the briefer asserts (Br., 5), that since the instant decision was based on a failure of proof it cannot be in conflict with the established Marsh Fork rule of the Fourth and Fifth Circuits—an obvious non sequitur. Clearly, if the fact **not** proved in the instant case (to wit the "exact" use as between repair and extension of the permanent haulage ways) does not **need** to be proved under the Marsh Fork rule, the instant decision is in conflict.

With further reference to page 5 of the opposing brief:

1. It is not true that the Harmon case "clearly demonstrates the factual nature of these cases." Rather the Harmon case, approving Marsh Fork, clearly demonstrates that the "exact use" in the instant case is quite immaterial. (Pet., 9.) Therefore the decision is in conflict with the long established rule of the Fourth and Fifth Circuits.

2. It must be apparent that this is not "an isolated case," but a case of general importance not only because of the conflicting rule but because of the serious accounting problems that would be created for mining companies, who could not enter expenditures on their books in accordance with established accounting methods prescribed in detail by the Marsh Fork decision; but would be required to wait until the items had been actually used and their "exact" use thereby established. This would be an impracticable process of retrospective accounting not contemplated by the statutes and regulations. Article 222 of Regulations and the rule **as expressed** in the Marsh Fork decision contemplate a prospective accounting in cases within the regulations.

3. The mere statement of the questions presented (Pet., 2), refutes the briefer's contention that this is an isolated case (Br., 5), and clearly demonstrates that the issue is of general importance.

CONCLUSION.

The decision below is in conflict with the decisions of the Fourth and Fifth Circuits, involving a question of general importance to all mining companies, who, we anticipate, will wish to proffer at the proper time a brief on the merits.

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